STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2014
v	No. 312237 Wayne Circuit Court
FREDDIE YOUNG, Defendant-Appellant.	LC No. 11-005214-FC

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). We affirm.

I. STATEMENT OF FACTS

The victim, Gregory McNichol, was shot and killed by defendant while McNichol was standing in the front of the apartment complex he owned and was renovating. After shooting McNichol, defendant got in his vehicle, left the scene, and returned to his home, where he told his wife that he "may have shot someone." He realized two or three days later that he did indeed shoot McNichol. Defendant was arrested five days later at his place of employment. Defendant never disputed shooting McNichol. Rather, he argued two alternative defenses—that he was acting in self-defense or that he accidently discharged the gun.

Following a preliminary examination, he was bound over on charges of first-degree murder and felony-firearm. Before trial, defendant sought to have the information quashed, arguing that there was insufficient evidence to permit a first-degree murder charge to go forward. In making this argument, defendant conceded that there was sufficient evidence to permit a second-degree murder charge to proceed. The trial court denied defendant's motion to quash as it held that there was sufficient evidence of both premeditation and deliberation to try him on the first-degree murder charge.

Defendant was first tried in January 2012. Following the testimony of several witnesses, a mistrial was declared because a prosecution witness answered an innocent question—"who was Nicole"—by stating that she was the person who allegedly called "the man who shot" McNichol to the scene. Because this answer was similar to proffered testimony the court had ruled

inadmissible, and the trial court was convinced that a curative instruction would not "unring the bell," the trial court granted defendant's request for a mistrial.

Before defendant's retrial, he filed a motion to dismiss the charges based on double jeopardy concerns. In short, defendant argued that the prosecutor intentionally goaded defendant into seeking a mistrial. The trial court denied the motion as it found that the prosecution's actions were not intentional, but were, at most, negligent. Accordingly, the trial court held "that the public interest in allowing a retrial in this matter outweighs the double jeopardy bar. And as a result of that, the defense team's very well presented argument as to a motion to dismiss is denied."

During the retrial, the prosecution called the mother of the individual who provided the inappropriate testimony in the first trial. While on cross-examination, the trial court sought clarification from the witness regarding whether a particular individual the witness was describing was the same woman that the witness had described at a different time. In response to the question, the witness told the judge that she was a different person, as it was the person "who called everybody, I guess, to come—." The court then cut her off, stating, "[n]ope. Okay. Thank you." During a break in the testimony and outside the presence of the jury, defendant requested another mistrial, arguing that the witness had

> blurted out, once again, what this Court has ruled . . . was impermissible . . . . [S]he tried to testify that she was the one who called the people over, that's what that witness said. And, again, it seems to go against this Court's ruling as it relates to this kind of hearsay information about somebody allegedly calling over [defendant] to shoot this individual.

Following arguments on the issues, the trial court denied the request for another mistrial. In denying the request, the trial court noted that the statements were substantially different this time, in that the statement in the first trial was specifically referencing defendant, whereas the statement in the retrial was a general statement regarding the fact that someone made a phone call to have everybody come to the scene. The court also noted that, with regard to the first statement, there had been issues about the reliability and trustworthiness of the statement.

At the close of the parties' proofs, defendant sought a motion for a directed verdict of acquittal with regard to all charges. The motion was denied. The jury was then instructed on the law. With regard to the first-degree murder charge, the jury was permitted to consider the lesser included defenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The jury was also instructed on the felony-firearm charge. Finally, the jury was instructed on the defenses of self-defense and accident. After deliberations of approximately one hour, the jury returned its verdict, finding defendant guilty on the lesser included charge of second-degree murder, as well as on the felony-firearm count. Based on these convictions, the trial court sentenced defendant to the statutorily mandatory sentence of two years with regard to the felony-firearm conviction and to a consecutive term of 20 to 35 years with regard to the second-degree murder conviction.

II. ANALYSIS

On appeal, defendant alleges four errors requiring reversal. First, defendant argues that double jeopardy barred retrial under the circumstances. Second, defendant argues that the trial court abused its discretion when it permitted photographs of guns, money, and money orders seized from defendant's house and truck on the date of his arrest to be admitted into evidence. Third, defendant argues that the trial court abused its discretion and erred when it denied his request for a mistrial in the second trial, as the testimony regarding the phone call being made to everyone to come to the scene required a mistrial just as the testimony in the first trial did. Fourth, defendant argued that the trial court erred when it permitted the jury to consider first-degree murder, claiming that there was insufficient evidence to permit the jury to find premeditation and deliberation beyond a reasonable doubt. For the reasons set forth below, we disagree with defendant's allegations of error and affirm his convictions.

A. DOUBLE JEOPARDY

Defendant argues that he should not have been retried following the mistrial because the prosecutor's error was based on a "willful disregard of the potential consequences of his actions" and, because of the prosecutor's level of experience, "he was or should have been aware of the potential consequences" of his failure to inform a "key witness" of the trial court's ruling that dealt with the witness's anticipated testimony. Because this is not the standard adopted in Michigan, and because we agree with the trial court that the prosecution did not intentionally goad defendant into seeking a mistrial, we hold that double jeopardy did not bar defendant's retrial.

Whether a retrial of a defendant following a mistrial is barred by double jeopardy is a constitutional issue that is reviewed de novo by this Court. *People v Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010). However, to the extent that the double jeopardy issue is based on factual findings of the trial court, including a determination regarding "whether the prosecutor intended to goad the defendant into moving for a mistrial," this Court reviews the factual findings for clear error. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

"The United States and Michigan Constitutions prohibit a defendant from being twice placed in jeopardy for the same offense." *People v Echavarria*, 233 Mich App 356, 362; 592 NW2d 737 (1999). With regard to whether a defendant may be retried following a mistrial, "retrial is permissible under double jeopardy principles where manifest necessity required the mistrial or the defendant consented to the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or judge, or by factors beyond their control." *Id*. at 363; see also *People v Gavel*, 202 Mich App 51, 53; 507 NW2d 786 (1993). However, the Supreme Court has held that in situations where the prosecution's actions were intentionally designed "to goad the defendant into moving for a mistrial," double jeopardy attaches and therefore bars retrial. *Dawson*, 431 Mich at 257, citing *Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982).

Here, the trial court clearly held that the prosecutor did not intentionally goad the defense into seeking a mistrial. Specifically, the trial court noted that the prosecutor's actions, "in [the court's] considered judgment, [do not] rise to an intention to goad the defense team into moving for mistrial," and were, "at best, [] carelessness," and "at most, . . . actual negligence," which "under Michigan law is not enough to bar a retrial." Defendant has not challenged this factual finding of the trial court. Thus, we do not need to consider the question whether the trial court clearly erred when it held that the prosecution did not act intentionally, but rather simply acted with, at most, negligence. Nonetheless, based on the record before us, we conclude that the trial court's factual findings on this issue were not clearly erroneous.

As the trial court noted, the prosecutor's failure to instruct the witness not to discuss the phone call was not done intentionally in the hope that the inadmissible information would be provided by the witness, and that this would goad defendant into seeking a mistrial. The record reflects that the witness's answer in the first trial was given in response to the innocuous question of "who was Nicole," a question that was asked of the same witness at the preliminary examination and was answered by explaining that she was either the niece or daughter of defendant's daughter, without any reference to the phone call that the trial court ruled could not be considered.

The trial court correctly determined that negligence was not sufficient under Michigan law to bar retrial under the Double Jeopardy Clause. As our Supreme Court held in *Dawson*, 431 Mich at 257, "[w]here a mistrial results from apparently innocent or even *negligent* prosecutorial error, or from factors beyond [the prosecutor's] control, the public interest in allowing a retrial outweighs the double jeopardy bar" (emphasis added). This has been the law of this state for over 25 years.

Thus, based on the long-standing precedent of this Court and the Supreme Court, we cannot appropriately consider defendant's request to adopt the "willful disregard" standard adopted by New Mexico in *State v Breit*, 122 NM 655, 666; 930 P2d 792, 803 (1996). Even if we were to be persuaded that we could appropriately expand the holding of *Dawson*, 431 Mich 234, the facts of this case do not rise to the level of "willful disregard" as adopted in *Breit*, 122 NM at 666. Here, it is clear that the prosecutor's action in failing to inform the witness of the court's earlier ruling, which led to the mistrial, was "an isolated instance during the course of an otherwise fair trial." *Id*. Accordingly, we conclude that defendant's retrial was not barred by double jeopardy.

B. ADMISSION OF EVIDENCE

Defendant next argues that the trial court abused its discretion when it admitted a photograph of weapons confiscated from defendant's home and vehicle at the time of his arrest as well as permitting information regarding money and money orders found in defendant's vehicle at the time of his arrest. In short, defendant argues that the prosecutor failed to lay a foundation tying this evidence to the charged offenses and, therefore, the evidence was not relevant or, even if relevant, its probative value was outweighed by the danger of undue prejudice. We disagree.

We note that while the defendant objected to the admission of the photograph of the weapons at his retrial, he failed to do so with regard to the information regarding the money and money orders. Thus, only the issue relating to the photograph of the weapons has been properly preserved for appellate review. *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007); *People v Bradshaw*, 165 Mich App 562, 568; 419 NW2d 33 (1988). "[A] trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." However, the issue "whether a rule of evidence bars admission, is reviewed de novo." *People v McDade*, 301 Mich App 343, 352; 836 NW2d 266 (2013). In the context of whether to admit evidence, "[a] trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Unpreserved objections to a trial court's evidentiary rulings are reviewed for plain error affecting the defendant's substantial rights, meaning a showing of prejudice is required. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Reversal is warranted only when the plain error results in a conviction of an actually innocent defendant or when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings independently of a defendant's innocence. *Id*.

MRE 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In the instant case, defendant argued, in addition to self-defense, that he did not realize he had shot McNichol. Therefore, defendant argued the defense of accident as well. In seeking admission of the photograph of the guns, the prosecutor argued that the photograph was relevant under MRE 401 because defendant's ownership of the guns showed "familiarity with, and access to, and knowledge of weapons." The trial court agreed and held that the photograph would be admitted because it was "relevant in the sense that it does go to an issue in the case that the Court finds to be material." We agree with the trial court that this information was properly admitted under MRE 401, especially given defendant's stated defense of accident.

We also conclude that the trial court properly exercised its discretion when it held that the evidence should not be excluded under MRE 403. In this regard, the court specifically held that "the probative value of it does in fact outweigh any prejudicial affect." Determinations of whether evidence should be excluded under MRE 403 "are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony." *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Given that these determinations are best left to the trial court at the time of the trial, and acknowledging the prosecutor informed the jury the weapons were legally in defendant's possession, we cannot conclude that the trial court abused its discretion when it ruled that MRE 403 did not bar the admission of this evidence. Further, given that evidence was introduced that defendant had a CCW permit, we conclude that even if it were error to admit the photograph of the weapons, any such error was harmless.

Finally, with regard to the decision to admit information about the money and money orders, we again note that defendant failed to object to the admission of this evidence at the time of its entry in the retrial. Thus, our review is limited to plain error affecting defendant's substantial rights. *Jones*, 468 Mich at 355. This requires a showing of prejudice, which defendant has not shown. *Id*. Indeed, the jury was specifically told that the money and money

orders were legally obtained lottery winnings. Thus, any inference the jury may have had regarding how defendant had so much money in his possession was put to rest. Accordingly, we conclude that the admission of the money and money orders did not result in the conviction of an actually innocent defendant nor did it seriously affect the fairness, integrity, or public reputation of the trial. *Jones*, 468 Mich at 355; see also *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Accordingly, we find that the trial court did not abuse its discretion in allowing into evidence the photograph of the weapons found in defendant's possession at the time of his arrest and find no plain error in the court's allowing the jury to hear information about the money and money orders he possessed.

C. DEFENDANT'S SECOND REQUEST FOR A MISTRIAL

Defendant next argues that because the challenged statement of the witness during the retrial was "nearly identical" to the statement the trial court determined required a mistrial in the first trial, it was error to not declare a mistrial in the second trial. We disagree.

A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "Error requiring reversal results only where a trial judge's denial of a defendant's motion for mistrial is so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Stewart*, 219 Mich App 38, 43; 555 NW2d 715 (1996). "[N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, 'an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.' " *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant argues that the trial court abused its discretion by not granting a mistrial in the second trial because the challenged testimony in the second trial was "nearly identical" to the comment made during the first trial, which led to a mistrial. A review of both the testimony and circumstances surrounding the testimony establishes that it was not nearly identical, but rather quite different. Specifically, the witness in the first trial testified on direct examination that an individual was "[t]he lady who called the man who shot," presumably defendant, before being cut off. The witness in the second trial, in response to a clarification question asked by the trial court during cross-examination, testified that she was referring to the person who "was the one who called everybody, I guess, to come."

This testimony, as clearly articulated by the trial court, is not "nearly identical" as argued by defendant. Indeed, the first witness testified in a specific manner whereas the second witness spoke in a general manner. In addition, on retrial, there was already evidence in the record that, upon defendant's arrival on the scene, he got out of his car and asked, "where's the nigga at?" Therefore, the jury already had evidence before it suggesting that someone had contacted defendant regarding McNichol. Otherwise, there simply would be no reasonable explanation of why defendant asked a question about where someone was, without identifying the person he

was looking for by name, upon his arrival. Further, the jury acquitted defendant of first-degree murder and identification of the shooter was not an issue in this case. Therefore, the testimony was not necessary to a finding of second-degree murder, as the testimony, if at all relevant, would have assisted in establishing premeditation and deliberation.

Accordingly, we conclude that the trial court was fully within its discretion when it denied defendant's request for a mistrial during the second trial.

D. EVIDENCE OF PREMEDITATION AND DELIBERATION

Defendant next argues that the trial court erred when it did not grant his motion for directed verdict of acquittal regarding the first-degree murder charge. Defendant maintains that there was not sufficient evidence for a jury to find the necessary elements of premeditation and deliberation beyond a reasonable doubt and, since these are necessary elements of a first-degree murder charge, the charge should not have been given to the jury. Because we believe that there was sufficient evidence with regard to premeditation and deliberation, we disagree.

Sufficiency of the evidence is subject to de novo review on appeal. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted). A trial court's decision on a motion for a directed verdict of acquittal is also reviewed de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). In deciding a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution up to the time the motion is made and, viewing that evidence in the light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

Here, evidence was presented that defendant drove from his home to the scene, which was a couple-mile drive. Evidence was also introduced that, upon defendant's arrival at the apartment complex, he immediately got out of his vehicle with the gun already in his hand and yelled "where's the nigga at?" before shooting McNichol. Testimony was also presented indicating that defendant had wanted to speak to McNichol ten days before the incident because he believed that McNichol had disrespected his daughter. Based on this evidence, viewed in the light most favorable to the prosecution as required on a motion for directed verdict of acquittal, we cannot say that a reasonable jury could not have found defendant guilty of first-degree murder beyond a reasonable doubt.

In any event, even assuming that there was insufficient evidence to permit the jury to find defendant guilty of first-degree murder, reversal would not be warranted. Defendant has not presented any argument to this Court that there was insufficient evidence to convict him of second-degree murder. Rather, defendant argues that his second-degree murder conviction should be reversed solely because the jury should not have been instructed on first-degree

murder and, therefore, it was possible that the conviction on the next lesser offense was erroneous. However, as this Court held in *People v Moorer*, 246 Mich App 680, 683; 635 NW2d 47 (2001):

> A defendant has no room to complain when he is acquitted of a charge that is improperly submitted to the jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury. Such a result squares with respect for juries. Further, not to adopt this view is to countenance a misuse of judicial resources by automatically reversing an otherwise valid conviction.

Likewise, while defendant cites *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998), for the proposition that reversal of the second-degree murder conviction is required, that portion of *Graves* is also of no assistance to defendant for at least two reasons. First, as noted, other than for reliance on a hyper technical aspect of *Graves*, defendant has not presented any argument to this Court that there was insufficient evidence to convict him of second-degree murder. As *Graves*, 458 Mich at 487, held:

> On the basis of this record, we are satisfied that it is highly probable that the error did not affect the verdict. Although it might have been error to submit the first-degree murder charge to the jury, it is undisputed that a second-degree murder charge was properly submitted to the jury.

Second, while defendant has latched onto the language in *Graves* that reversal "may be warranted in certain circumstances" including when "a defendant is convicted of the next-lesser offense after the improperly submitted greater offense," *Graves*, 458 Mich at 487-488, it is clear that the language is both dicta, as it was not necessary to the holding in *Graves*, and also discretionary, as it noted that reversal *may* be warranted, not that reversal was mandatory.

Accordingly, we hold that the trial court did not err in presenting the first-degree murder charge to the jury. Alternatively, even if it were error to present the first-degree murder charge, reversal is not warranted because the evidence fully supported defendant's conviction of second-degree murder.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher